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Supreme Court, U.S.
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No. 03-1004

In the Supreme Court of the United States

AMMEX, INC.

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

The United States' Brief in Opposition establishes that this Court should grant Ammex's petition.

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THIS CASE RAISES THE IMPORTANT QUESTION OF WHETHER *RES JUDICATA* BINDS THE UNITED STATES AND ITS AGENCIES.

The United States belies its contention that the court of appeals' decision was "fact specific" by arguing in the next sentence that:

> an agency is not required to raise every possible justification for a particular decision in . . . defending a ruling against a legal challenge, and res judicata does not bar an agency from exercising its regulatory authority to consider additional legal or factual issues if the agency decision is set aside.

(Opp. at 7.) The United States also claims that *res judicata* did not apply to Customs:

> Customs [was] not obligated to defend its Headquarters Rulings in the Court of International Trade on the alternative ground that petitioner's gasoline and diesel fuel are taxable and therefore not "duty-free merchandise . . .."

(Opp. at 9.)

The United States cited no authority in support of its claim that *res judicata* does not apply to federal agencies. This Court has recognized that *res judicata* unquestionably does apply against the United States, its agencies and officers. *Alaska Department of Environmental Conservation v. Environmental Protection Agency*, 124 S. Ct. 983, 1003, n. 14 (2004); *United States v. Mendoza*, 464 U.S. 154, 163

(1984) ("res judicata, of course, prevents the government from relitigating the same cause of action against parties to a prior decision"); *see also United States v. Cty. of Cook*, 167 F.3d 381, 385 (7th Cir. 1999)("for a long time it has been understood that the United States, like a private litigant, cannot relitigate claims that have reached a full judgment").

Thus, the United States' Brief in Opposition demonstrates that this case raises important questions relating to the finality of litigation involving federal agencies in general. If the decisions below are not reversed, in the future the United States will use them in support of its claim that *res judicata* does not bind the United States. Therefore, this case raises important issues worthy of granting Ammex's petition because the decisions threaten long-standing *res judicata* principles, which prohibit the United States from litigating "by piecemeal, as by presenting a part only of the available grounds and reserving others for another suit, if failing in that." *Grubb v. Public Utilities Comm'n*, 281 U.S. 470, 478 (1930).

II. THE COURT OF APPEALS DECISION NECESSARILY MEANS THAT *RES JUDICATA* DOES NOT APPLY TO A JUDGMENT AGAINST AN AGENCY

A. *Ammex II* Contravened the Statutory Construction in *Ammex I*.

The United States argues that Customs' decision to revoke approval of Ammex's duty-free motor fuel sales did not contravene the decision in *Ammex I* (Opp. at 6), which held unequivocally that "19 U.S.C. §§ 1555 and 1557 allow the duty-free sale of gasoline and diesel fuel from a duty-free enterprise." (App. at 42a.) The United States claims that the decision in *Ammex I* narrowly construed only two subsections of the OTCA — 19 U.S.C. §§ 1555(b) and 1557(a)(1) and did

not consider the issue of whether motor fuel sold from Ammex's duty-free sales enterprise satisfied the 19 U.S.C. § 1555(b)(8)(E) definition of "duty-free merchandise" if motor fuel tax is assessed under I.R.C. § 4081(A)(1)(a)(iii). (Opp. at 6.) Rather, the United States and the Court of International Trade presumed during *Ammex I* that the motor fuel satisfied this definition. (Opp. at 9.) *Arizona v. California*, 530 U.S. 392, 395 (2000) ("The Court disapproves the notion that a party may wake up and effectively raise a defense years after the first opportunity to raise it so long as the party was (though no fault of anyone else) in the dark until its late awakening").

However, the Court of International Trade in *Ammex I* analyzed in-depth the OTCA statutory scheme, including its history and applicable regulations. (App. 39a-40a, n. 6-8.) Based on that in-depth analysis, the Court of International Trade concluded that:

> In view of §1557(a)(1)'s instruction that 'any merchandise subject to duty' may be entered and then withdrawn from a bonded warehouse, the court finds that Customs violated this provision in promulgating HQ 227385. Section 1557(a)(1) provides that all types of dutiable merchandise may be sold from bonded warehouses, including duty-free stores, and it was error for the government to read into 19 U.S.C. § 1555(b)(3)(D) and (E) an exception beyond those specifically stated in § 1557(a)(1).

(App. 34a-35a.) The I.R.C. § 4081(A)(1)(a)(iii) defense is the United States' attempt to posthumously impose yet another illegal exception to that rule. Customs' revocation contravened the decision in *Ammex I* because that decision considered the OTCA statutory scheme regulating duty-free sales enterprises and concluded without qualification that "19

U.S.C. §§ 1555 and 1557 allow the duty-free sale of gasoline and diesel fuel from a duty-free enterprise." (App. at 42a.) The United States' position would permit federal agencies to litigate piecemeal each of the statutory subsections administered by a federal agency, and other statutes, *ad infinitum*. That outcome conflicts with *res judicata* principles and would virtually eliminate finality in such cases.

B. The United States Could Have Raised the I.R.C. § 4081(A)(1)(a)(iii) Defense in *Ammex I* Because It Was a Legal Defense.

The United States asserts that *res judicata* does not bar the I.R.C. § 4081 defense raised in Customs' revocation because *Ammex I* considered only whether gasoline and diesel fuel are "unidentifiable fungibles" that cannot be sold from duty-free stores pursuant 19 U.S.C. §§ 1555 and 1557 and did not consider the application of I.R.C. § 4081 to those same statutes. (Opp. 8.) The United States further argues that Customs' revocation was based on a different administrative record than that considered in *Ammex I*. (*Id.*)

However, Ammex's claim in *Ammex I* that the OTCA authorizes duty-free motor fuel sales is based on the same transactional facts that prompted Customs' revocation (i.e., Ammex sold motor fuel from its sterile duty-free store operated under 19 U.S.C. §§ 1555 and 1557). No facts changed and no new facts arose. Customs merely raised a purported legal defense that it could have, but did not, raise in *Ammex I*.

Moreover, the administrative record was the same in each case, with the sole exception of the application of I.R.C. § 4081(A)(1)(a)(iii) to these common transactional facts. Indeed, Customs' revocation states:

> IRS has not provided Customs with any information from Ammex's tax returns; it *has merely informed*

> *Customs that 26 USC 4081 imposes a tax upon entry of gasoline and diesel fuel. This decision does not determine whether Ammex actually paid the tax. The only determination is that fuel which is assessed a tax under § 4081 cannot qualify for entry under 19 USC 1555(B)(1).*

(App. 105a-106a.) [Emphasis added.] Thus, the United States admitted in its administrative proceeding that it considered no new facts but rather woke up to the I.R.C. § 4081(A)(1)(a)(iii) legal defense after losing *Ammex I. Arizona*, 530 U.S. at 395.

Not only did Customs' revocation involve no new facts, the United States did not need any new facts to raise the defense that fuel, once assessed a tax under § 4081, cannot qualify for entry under 19 USC 1555(b)(1). I.R.C. § 4081(A)(1)(a)(iii) provides that:

> There is hereby imposed a tax at the rate specified in paragraph (2) on . . .
>
> * * *
>
> (iii) the entry into the United States of any taxable fuel for consumption, use, or warehousing."

(App. 79a.) No additional facts were necessary to raise such a defense since Ammex, a duty-free sales enterprise, is in the business of entering fuel for warehousing in the sense that term is used with respect to duty-free enterprises. 19 U.S.C. § 1557(a)(1). (App. 75a.) In *Ammex I*, the Court of International Trade accepted Ammex's argument that 19 U.S.C. § 1557(a)(1) permits the entry and withdrawal (for exportation) of motor fuel from bonded warehouses such as Ammex. (App. 30a-37a, 42a.)

Moreover, the Treasury regulations applicable to I.R.C. § 4081 provide that Customs law determines the identity of

the "enterer" and the time that such fuel is entered under I.R.C. § 4081. In other words, Customs law determines who pays the tax and when it is imposed. Treas. Reg. § 48.4081-1 provides, in relevant part, that:

> Enterer generally means the importer of record (under customs law) with respect to the taxable fuel. However, if the importer of record is acting as an agent (for example, the importer of record is a customs broker engaged by the owner of the taxable fuel), the person for whom the agent is acting is the enterer. If there is no importer of record for taxable fuel entered into the United States, the owner of the taxable fuel at the time it is brought into the United States is the enterer.
>
> Entry of taxable fuel into the United States occurs when--
>
> (1) The taxable fuel is brought into the United States and applicable customs law requires that the taxable fuel be entered into the United States for consumption, use, or warehousing . . .

Similarly, the legislative history of I.R.C. § 4081(A)(1)(a)(iii) indicates that Congress intended that Customs law determines when motor fuel is entered:

> The entry of gasoline into the United States is considered to occur at the time the gasoline is transferred from customs custody unless the gasoline is transferred in bulk to a terminal."

H.R. Conf. Rep. No. 101-964 at 1052, reprinted in 1990 U.S.C.C.A.N. 2017, 2757.

Customs law controls who owes the I.R.C. § 4081(A)(1)(a)(iii) tax and when the tax is imposed (upon "entry"). In short, the application of I.R.C.

§ 4081(A)(1)(a)(iii) to 19 U.S.C. § 1555(b)(8)(E) is not a new fact, and was nothing new to Customs, but is rather a new legal theory, which could have been, but was not, raised in *Ammex I*.

The United States' argument that "it is unlikely" that the United States could have raised the I.R.C. § 4081(A)(1)(a)(iii) defense in Court of International Trade because it was not part of the agency record (Opp. 9), assumes the erroneous conclusion that I.R.C. § 4081(A)(1)(a)(iii) was a new fact. As amply demonstrated above, no new facts were considered and I.R.C. § 4081 tax was in fact mentioned in the agency record. (App. 46a.)

Assuming *arguendo* that the United States could not have raised the I.R.C. § 4081(A)(1)(a)(iii) defense in the Court of International Trade, *res judicata* doctrine still bars that defense because the United States failed to raise it in its administrative proceeding. From the beginning, Ammex sought authorization to sell motor fuel from its duty-free sales enterprise. (App. 44a.) In denying such authorization, the United States was required to present all defenses to Ammex's claim or have such defenses barred by *res judicata*. *United States v. Utah Construction and Mining Co.*, 384 U.S. 394, 422 (1966) (courts have not hesitated to apply *res judicata* where administrative agency acts in judicial capacity). Here, Customs acted in a judicial capacity in construing 19 U.S.C. §§ 1555 and 1557. Therefore, *res judicata* required Customs to raise all defenses, including I.R.C. § 4081(A)(1)(a)(iii), in denying such authorization. A contrary result would permit federal agencies to relitigate each subsection of the statute administered *ad infinitum* and virtually eliminate finality in such cases. *Cty. of Cook*, 167 F.3d at 358-86 (United States conceded that sovereign immunity exception to *res judicata* would logically lead to United States relitigating *ad infinitum*).

CONCLUSION

Therefore, Petitioner respectfully requests that this Court grant this petition for writ of certiorari, reverse the decision of the United States Court of Appeals for the Federal Circuit and the Court of International Trade in *Ammex II*, and hold that the decision in *Ammex I* binds the United States and precludes the United States from re-litigating the issue of whether the OTCA authorizes Ammex to sell tax and duty-free motor fuel from its duty-free sales enterprise.

Respectfully Submitted,

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